IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

SECOND APPEAL NO.384 OF 1993

1. Balkrishna Keru Sonawane
2. Bakubai Keru Sonawane
3. Nanda Bhagwan Korde
4. Leelabai Dattatray Korde
5. Bhimabai Ramchandra Ingale
   Nos.2 to 5 Household residents
   of Nos.1 and 2, Ghoti Bk.
   Taluka Igatpuri, Dist.:Nasik
   Nos.3 and 4, Opp: Subhash
   Library, Budhwar Peth
   Nasik ... Appellants

V/s.

Ratanlal Kesharchand Bothra
resident of Ghoti, Budruk,
Tal.: Igatpuri, Dist.:Nasik ... Respondent

Mr.R.A. Thorat for Appellants
Mr.C.M. Kothari for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **DECEMBER 3, 2004**
JUDGMENT PRONOUNCED ON: JANUARY 19, 2005

JUDGMENT:

. This Second Appeal has been filed against the judgment of the Additional District Judge, Nasik dated 3.10.1992.

2. The facts giving rise to the Second Appeal are as follows:

The Plaintiff, that is the Respondent herein, filed a

suit for recovery of the suit premises being House No.468 situated at Village Ghoti Taluka Igatpuri and for damages from 1.5.1975 to 30.4.1978 amounting to Rs.7,000/-. The case of the plaintiff was that one Keru Narayan Sonawane, the father of Defendant Nos.1, 3 to 5 and the husband of Defendant No.2 was his partner for running a flour mill and an oil mill. According to the Plaintiff, the suit premises were utilised for the flour mill and oil mill without rent. The mill was to be installed by the deceased Keru Narayan. Both the partners were to have equal share in the profits. The plaintiff claimed that this business was run from 23.6.1966 till 31.10.1973 when the partnership was dissolved. Keru Narayan expired on 12.8.1975 and his heirs who were in possession of the suit premises were refusing to vacate the same. A suit was filed by the plaintiff, demanding possession of the suit premises and damages from November 1973. The plaintiff also sought damages @Rs.200/- per month and removal of the machinery from the suit premises.

3. In the written statement filed by the defendants in October 1978, they contended that the suit premises were let out to Keru Narayan at Rs.30/- per month. They claimed that Keru Narayan was the tenant of the plaintiff and, therefore, they were entitled to continue as tenants of the plaintiff. The defendants however,

denied any partnership between the plaintiff and Keru Narayan. several issues were framed by the trial Court. One of the issues was whether there was any relationship of tenant and landlord between the defendants and the plaintiff. The trial Court held that the plaintiff was unable to prove that there was a partnership between himself and Keru Narayan or that it had been dissolved on 31.10.1973. The trial Court found that the plaintiff had proved that Keru Narayan had agreed to vacate the suit premises within two months from 31.10.1973 and since he had not vacated the same he had agreed to vacate it by 31.10.1974. It was also proved according to the trial Court that Keru Narayan had agreed to pay Rs.200/- as damages per month. The trial Court was of the view that there was no relationship of tenant and landlord between the plaintiff and the defendants. The trial Court disbelieved the evidence of the defendants that they were in possession as tenants. The rent receipts produced by the defendants were not accepted by the trial Court since they were in respect of some other premises in respect of House No.457 and not House NO.468 which was in their possession. The trial Court decreed the suit and directed the defendants to deliver the possession of the suit premises to the plaintiff after removing the flour mill and the oil mill. The defendants were further directed to pay Rs.7200/- to the plaintiff towards damages from 1.5.1975 to 30.4.1978.

4. Aggrieved by the decision of the trial Court, the defendants preferred an appeal before the Additional District Judge, Nasik being Civil Appeal No.327 of 1986. The appellate Court was of the view that the trial Court had correctly decided the issue. The appellate Court found that the plaintiff had proved that the defendants' father had agreed to vacate the suit premises within two months from 31.10.1973 and since he did not vacate on that date after he agreed to vacate after extending the period to 31.10.1974. The appellate Court also was of the view that the plaintiff had proved that Keru Narayan had agreed to pay damages at Rs.200/- per month. However, existence of the relationship of landlord and tenant between the plaintiff and the defendant was not accepted. The trial Court was of the view that after the dissolution of the firm, the deceased Keru Narayan became a licencee. These findings of the appellate Court came to be challenged in the present second appeal.

5. Bearing in mind the fact that this Court could entertain a Second Appeal under section 100 of the C.P.C. only if a substantial question of law is raised and has been framed, I will not proceed to decide whether the second appeal is maintainable. The question of law raised in the present Second Appeal has been

framed as under:

"Whether the appellants are entitled to protection under the Rent Act in view of the subsequent amendment to the Act in 1987 especially when there is no dispute that the appellants are in occupation of the suit premises since 1966?

6. The following additional grounds have been raised:

(1-H) Whether the Lower Appellate Court erred in rejecting application for amendment at Exhibit 29 merely on the ground of delay. It is the Plaintiff's case that Keru Sonawane entered into the possession of the suit premises under partnership and he continued in possession after dissolution. It is implicit in the case of he Plaintiff that Keru Sonawane was licencee in possession and such licencee would be protected under Section 15-A of the Bombay Rent Act, and Keru Sonawane would become tenant of the premises on 1st February 1973.

(1-I) Whether the courts below committed grave error after disbelieving the substantive case of the Plaintiff regarding alleged oral partnership dated 23rd June 1966 and its alleged dissolution on 31st October, 1973 and thereafter still proceeding to hold that keru Sonawane was in unauthorised possession of the suit premises.

(1-J) Whether failure of the Defendants to prove tenancy would automatically result in a finding that they are in unauthorised possession when their

> possession in admittedly permissive as pleaded by the Plaintiff. It is submitted that such possession would be protected under Section 15-A of the Bombay Rent Act and the Defendants would be entitled to be declared as tenants of the suit premises.

7. The plaintiff has filed cross objections on 14.9.1993. The substantial question of law, therefore, before me is whether the deceased Keru Narayan was a protected tenant under section 15A of the Bombay Rent Act when it has been held by the first appellate Court that he was a licencee in possession.

8. Mr.Kothari, learned Counsel appearing for the Plaintiff, submits that when there are concurrent findings of fact, howsoever erroneous, they should not be disturbed by this Court in a Second Appeal. He places reliance on the judgment of the Apex Court in *Kondiba Dagdu Kadam v/s. Savitribai Sopan Gujar & Ors.*, **1999(3) ALL MR 467**. He further submits that unless this Court is satisfied that there is a substantial question of law involved in the present case, no interference is called for. He places reliance in the judgment in the case of *Santosh Hazari v/s. Purushottam Tiwari*, **2001(2) Mh.L.J. 786.**

9. There is no dispute that both the Courts below have held that there is no relationship of landlord and

tenant between the plaintiff and the defendants. Therefore, this finding cannot be disturbed as it is a concurrent finding of fact nor can the finding that there is no partnership between the plaintiff and Keru Narayan be disturbed. As held in the case of *Kondiba Dagdu Kadam* (supra), it is not within the domain of the High Court to disturb the findings of fact. The Apex Court has held where a point of law has not been pleaded or is found to be arising between the parties, in the absence of any factual foundation, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The Second Appeal cannot be decided merely on equitable grounds. In the case of Santosh Hazari (supra), it has been held that the existence of a substantial question of law is a sine qua non for the exercise of jurisdiction by the High Court in a Second Appeal. Unless the High Court is satisfied that there is a substantial question of law involved, it should not interfere with the findings of the Courts below. The Apex Court has held that the substantial question of law need not be of general importance when a second appeal is to be heard. To be a question of law involved in the case, there must be first a foundation for it laid in the pleadings and the question should arise from the sustainable findings of fact arrived at by the Court of facts. It must be necessary to decide that question of law for a just and

proper decision of the case. The Apex Court was of the view that if an entirely new point arises for the first time before a High Court it is not a question involved in the case unless it goes to the root of the matter.

10. There is no dispute that the contention which is sought to be raised, that of the Appellant being a protected tenant under section 15A of the Rent Act was never raised by the defendants either before the trial Court or before the appellate Court. The amendment to the Bombay Rent Act was enacted on 1.2.1973 protecting licencees who were in occupation as on 1.2.1973, enabling them to become tenants. The suit against the defendants was filed on 15.10.1976. The written statement was filed on 27.10.1978. The defendants did not care to take up this plea in their written statement. Nor did the case before the trial Court proceed on the basis that they were protected by the 1973 amendment. Even before the appellate Court, the defendants did not bother to raise this ground as all along they contended they were tenants under the Rent Act. After the concurrent finding of fact has been arrived at by the two Courts below that there is no relationship of landlord and tenant between the plaintiff and the defendants, it would not be proper to reopen the issue at this stage.

11. Furthermore, there must be a foundation laid in the pleadings and the question that emerged from the sustainable findings of fact arrived at by the Court. Both the trial Court and appellate Court have not accepted the rent receipts produced by the defendants as they were in respect of some other premises and not the suit premises. There is no substantial question of law which requires consideration by this Court. Even on merits the Appellants have not laid any factal foundation in their pleadings in order to raise the contention that they were protected licensees by virtue of the 1973 amendment to the Rent Act.

12. Appeal dismissed. No costs.

13. The learned Advocate for the Appellants seeks time of four months to vacate the premises. In the circumstances of the case, I am of the opinion that the appellant should be granted time till 31.3.2005 to vacate the premises on condition that each of them files an undertaking in this Court in the usual terms within a period of one week from today.

14. According to Mr.Kothari, the appellants have not deposited the entire amount of rent which is payable. The appellants are directed to deposit the same in the trial Court by 31.1.2005.